

NO. 48873-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the lead case investigator expressed his opinion during appellant's assault trial that appellant intended to inflict great bodily harm.

2. Defense counsel was ineffective and denied appellant a fair trial by failing to object to the improper opinion on guilt.

Issues Pertaining to Assignments of Error

1. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. Witnesses must therefore never offer an opinion, even by inference, as to a defendant's guilt. The primary disputed issue at trial was whether, appellant had the intent to inflict great bodily harm during the alleged assault. The lead investigator in the case testified, "shanks are obviously intended to inflict great bodily harm. They are made to intimidate, and to assault, and to -- to harm a person for whatever their intent is." 2RP<sup>1</sup> 50-51. Did this improper opinion testimony deny appellant his constitutional right to a fair and impartial trial?

2. Defense counsel failed to object to the lead investigator's opinion that appellant had the intent to inflict great bodily harm and was

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – November 2, 2015 and March 7, 2016; 2RP – March 29, 2016 and April 19, 20, 21, and 28, 2016.

therefore guilty of assault. Did this failure to object deny appellant his constitutional right to effective representation?

B. STATEMENT OF THE CASE

1. Procedural History.

The Mason County prosecutor charged appellant Carlos Avalos by amended information with one count each of first degree assault and second degree assault for an incident that occurred on September 28, 2015. CP 69-70. A jury found Avalos guilty of both counts. CP 23-24.

At sentencing, the trial court vacated the second degree assault conviction after finding it merged with the first degree assault conviction. CP 8; 2RP 303. The court found the first degree assault to be a “most serious offense” under RCW 9.94A.030(33)(a). The court also found Avalos had two prior convictions for second degree assault, both of which constituted “most serious” offenses under RCW 9.94A.030(33)(b). The court determined Avalos was a “persistent offender” under the Persistent Offender Accountability Act (POAA) and sentenced him to a lifetime of confinement without the possibility of parole. RCW 9.94A.030(38); 9.94A.570. CP 8-21; 2RP 302-03.

The court imposed only mandatory legal financial obligations (LFOs). CP 8-21. Avalos timely appeals. CP 6.

2. Trial Testimony.

On September 28, 2016, Avalos was transported from the Washington Corrections Center where he resided, to Mason County Superior Court for a plea hearing in an unrelated case. 2RP 112, 141, 167. Before the transport, Avalos was strip searched and an electronic shocking device designed to disable movement was placed on his body. 2RP 45, 54, 61, 112-14, 122, 141-42. Avalos was cooperative and made no threats before the transport. 2RP 131. Nothing was found during the strip search of Avalos. 2RP 124.

Avalos was transported back to the corrections center after his court hearing. Corrections Officer Richard Squire grabbed Avalos to help him out of the transport van. Avalos pulled his arms back and then lunged forward striking Squire in the face with a handmade tool. 2RP 115-16, 129-30, 145. The electronic shocking device had been disabled and was ineffective in disabling Avalos. 2RP 121, 146, 186-87, 195-96. Avalos was immediately and forcefully taken to the ground causing him to drop the tool. 2RP 117, 149.

Squire suffered a puncture wound to his cheek. 2RP 106, 108-09. The wound did not bleed profusely. 2RP 101, 108. There was no evidence that his injury required hospitalization or left any lasting mark or injury. Several corrections officers also complained of knee, hand and back injuries

from forcibly taking Avalos to the ground. 2RP 119-20, 130, 150-51. Avalos suffered an abrasion to his face but was medically cleared and taken back to his room in the facility. 2RP 170-71.

Mason County sheriff detective Luther Pittman interviewed Avalos and several corrections officers later that afternoon. 2RP 66-68, 166, 172, 177. Avalos told Pittman he did not recall what happened. 2RP 158, 173, 175-76. Avalos never indicated that Squire was the specific target of his action. 2RP 158-59.

Pittman also took the tool into evidence. 2RP 76. The tool contained metal removed from the keyboard of the corrections center law library. 2RP 82-83, 157-58, 162-64, 205. Pittman also obtained surveillance video from Avalos' cell which appeared to show him sharpening the tool on the wall of his room, and placing the tool inside his hair with a rubber band. 2RP 84-85, 90, 96, 99-100, 185, 201. The rubber band was not tested to determine whether it would hold the weight of the tool. 2RP 92.

Avalos testified on his behalf. He explained that he desired to be housed closer to his family in Walla Walla. His attempts at obtaining a transfer were unsuccessful however. 2RP 182-83. As a result, Avalos decided to assault a corrections center because he knew that would cause him to be transferred to a different facility. 2RP 182-83, 187-88, 193-94, 212-13, 216. Avalos denied that he assaulted Squire with the intent of



inflicting great bodily harm. 2RP 187-88. Avalos was transferred to a different facility 12 days after the incident. 2RP 211-12.

C. ARGUMENT

1. AVALOS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE LEAD INVESTIGATOR IMPROPERLY EXPRESSED HIS OPINION ON AVALOS' GUILT.

Avalos' right to a fair trial was compromised beyond repair when the jury heard testimony from lead corrections center investigator Steven DeMars that he believed Avalos committed the assault with intent to inflict great bodily harm. 2RP 41, 50-51. On direct examination, the following exchange occurred between the prosecutor and Investigator DeMars:

- Q: And what are the concerns about shanks in a correctional setting?
- A: Shanks are obviously intended to inflict great bodily harm. They are made to intimidate, and to assault, and to -- to harm a person for whatever their intent is. So staff have concerns about that all the time. We don't wear vests, and so that is our greatest concern. When we do transports, we do wear vests. But clearly we're not expecting to be stabbed or --
- Q: Okay. So you said that corrections officers rely on their -- their authority to maintain -- to keep the peace.
- A: Verbal tacticals, and authority with the uniform, and absolutely.

Q: Okay. And this authority, does it work when a person has shank and attacks an officer out of nowhere?

A: No

Q: Why is that?

A: Because the – the – clearly their intent is to do harm. And – and the authority, the – law doesn't matter at that point. Their – their intent is to do whatever damage and harm to that person.

2RP 50-51.

This Court should find that Investigator DeMars – by testifying that he believed Avalos' "obviously intended to inflict great bodily harm" by using a shank during the assault – provided an improper opinion on Avalos' guilt, thereby denying him a fair trial.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, rev. denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In determining whether testimony is impermissible, trial courts consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’” State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759). Opinion testimony is “clearly inappropriate” in a criminal trial when it contains “expressions of personal belief[]s to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” Id.

Here, the witness was akin to a law enforcement officer (the chief investigator for the Washington Correction Center), meaning his testimony carried an “aura of reliability” with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765); see also State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (“Particularly where [an opinion on guilt] is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.”), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).

The nature of the testimony was that Investigator DeMars believed Avalos’ assaulted Squire with intent to inflict bodily injury. These improper

opinions were critical because Avalos' intent was very much in dispute at trial. The improper opinion went to the core issue in the case – whether Avalos committed the assault with the intent to inflict bodily injury. As the State itself recognized during its closing argument, this was the main issue for jurors to decide. See 2RP 267 (“And [element] (3) is probably going to be the most heavily contested element, I believe, in this trial. And (3) is that the intent – that the defendant had the intent to inflict great bodily harm. Did he?”).

DeMars improperly voiced an opinion as to Avalos' guilt, on an essential element of assault, and the only disputed issue in the case. Washington courts have condemned similar testimony as constituting an improper opinion in State v. Farr-Lenzini,<sup>2</sup> and Montgomery.

Farr-Lenzini was charged with attempting to elude police, and alternatively, reckless driving. Farr-Lenzini, 93 Wn. App. at 458. Her state of mind was “a core issue.” Id. at 463. Over defense counsel's objection, the State was permitted to ask the pursuing police officer to give his opinion “as to what the defendant's driving pattern exhibited[.]” The officer responded that the driver “was attempting to get away from me and knew I was back there and refusing to stop.” Id. at 458. Farr-Lenzini argued the officer testimony as to her state of mind violated her right to a

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<sup>2</sup> 93 Wn. App. 453, 970 P.2d 313 (1999).

jury trial. Id. at 459. The Court of Appeals agreed, finding the testimony constituted an opinion that Farr-Lenzini acted willfully. Id. at 462-64.

In Montgomery, a detective testified he believed Montgomery was purchasing items with the intent to manufacture methamphetamine – which was the crime he was charged with. There was no objection and no instruction. 163 Wn.2d at 588. However, when the prosecutor asked why the detective believed what he did, the court sustained defense counsel’s objection the question went to the ultimate issue. Id. A second detective – with no objection from defense counsel – testified, “those items were purchased for manufacturing.” Id. at 588 (citing to record omitted). A chemist testified similarly about the purchases: “these are all what lead me toward this pseudoephedrine was possessed with intent.” Id. at 588 (citation to record omitted). On appeal, Montgomery argued the unobjected-to testimony amounted to improper opinion evidence and could be challenged for the first time on appeal. The court agreed the state’s witnesses’ testimony amounted to improper opinions on guilt. Id. at 594-95.

Like Farr-Lenzini and Montgomery, here DeMars impermissibly gave opinion testimony as to Avalos’ guilt. As a constitutional error, the State bears the burden of demonstrating that the improper opinion on Avalos’ guilt – presumed prejudicial – was harmless beyond a reasonable

doubt. Quaale, 340 P.3d at 218; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). In a case where Avalos denied any intent to inflict great bodily harm, the State cannot make this showing.

In response, the State will likely note the absence of a defense objection to DeMars' opinion on guilt. The issue is still properly raised, however, under RAP 2.5(a)(3) because it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3) requires some "'plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1990)). In the context of improper opinions, this requires "an explicit or almost explicit witness statement on an ultimate issue of fact." Id. at 936 (citing WWJ Corp., 138 Wn.2d at 603).

As discussed above, DeMars offered an explicit opinion on an ultimate and disputed issue of fact – whether Avalos committed the assault with an intent to inflict great bodily harm. Given Avalos' denials, a plausible showing has been made that the improper opinion impacted the jury's verdict at trial.

The Supreme Court has sometimes declined to find opinion testimony manifestly prejudicial because it presumed jurors followed

instructions telling them they were the sole judges of credibility and not bound by an expert's opinion. See Montgomery, 163 Wn.2d at 595-596; Kirkman, 159 Wn.2d at 937. Avalos' jury received similar instructions. See CP 26-27 (instruction 1); 2RP 247-48. But the jury was also instructed to consider all the admitted evidence, including testimony. CP 26 (instruction 1); 2RP 246-47. Nothing in the instructions prohibited jurors from adopting DeMars' improper opinions. They merely explained that jurors were not required to accept them.

In State v. Barr, 123 Wn. App. 373, 381-84, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005), the Court of Appeals concluded that a police officer's testimony was an impermissible opinion on Barr's guilt constituting manifest constitutional error.

Barr was charged with rape, unlawful imprisonment, and vehicle prowl. Barr, 123 Wn. App. at 378. At trial, a police officer explained that a particular type of investigative technique trained him to look for verbal and nonverbal clues that someone was being deceptive. The officer testified that using this technique he was able to determine that Barr's posture, breathing, voice inflection, and mentions of prison indicated that Barr was being deceptive. Id. at 378-79.

Barr argued for the first time on appeal that the officer's testimony was an impermissible opinion on Barr's guilt. Barr, 123 Wn. App. at 380-

81. The Court of Appeals agreed, finding the testimony embodied the officer's opinion that Barr committed the offence and that his training in evaluating Barr's statements and body language proved this opinion was true. The Court explained, "In other words, the officer was testifying, as an expert, as to his opinion regarding manifestations of Mr. Barr's guilt." Id. at 382. The Court noted, the officer's testimony was "clearly designed" to give the officer's opinion as to Barr's guilt. Id. at 382.

The Court noted the "ultimate issue" revolved an assessment of the credibility of Barr and the complaining witness. Barr, 123 Wn. App. at 384. Recognizing the opinion of the police officer was likely to influence the jury, the Court found the untainted evidence was not so overwhelming that admission of the improper opinion evidence was harmless beyond a reasonable doubt. Id. at 384.

Like Barr, DeMars' opinion was critical at Avalos' trial given the disparate evidence of his intentions and the critical importance of this issue to the jury's verdict. The integrity and authority of the Washington Corrections Center buttressed DeMars' opinion that Avalos committed the assault with intent to inflict great bodily harm and was therefore guilty. Given the special aura of reliability DeMars' opinion carried and the centrality of credibility in this case, this Court should conclude this error affected the jury's verdict, find manifest constitutional error, and reverse.



2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THIS HIGHLY PREJUDICIAL OPINION TESTIMONY.

Alternatively, if this Court concludes this issue was not preserved, Avalos was denied his right to effective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

The failure to object to this clearly improper and highly prejudicial opinion on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason

for permitting clearly improper opinion testimony that lead investigator DeMars believed Avalos had “obviously” committed the assault with the intent to “inflict great bodily harm.” 2RP 50. This opinion testimony went directly to the only disputed issue of fact that the jury had to decide. An objection to this improper opinion testimony would likely have been sustained. Indeed, case law in existence well before Avalos’ trial clearly warned against the type of improper witness opinion evidence at issue here. See Montgomery, 163 Wn.2d at 596 (recognizing that had Montgomery objected to improper opinion testimony “it seems likely” they would have been sustained and curative instructions given).

Moreover, Avalos has shown prejudice. As discussed in argument one, infra, there is a reasonable probability that introduction of DeMars’ opinion evidence affected the jury’s verdict. There is a reasonable probability this testimony tipped the scale in the State’s favor and that, had counsel objected, the result of the jury’s verdict would have been different. Avalos’ conviction should be reversed because counsel’s failure to object was objectively unreasonable and undermines confidence in the outcome of the trial. See Strickland, 466 U.S. at 669.

### 3. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Avalos was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 2-5. If Avalos

does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Avalos' ability to pay must be determined before discretionary costs are imposed.

The existing record establishes that any award of appellate costs would be unwarranted in this case. The record is replete with evidence of indigency. For example, the trial court waived all non-mandatory fees, based on defense counsel's assertion that given the nature of the sentence, "Mr. Avalos won't be in a position to work or earn any income in the foreseeable future[.]" 2RP 295-96, 300, 303-04; CP 14.

Without a basis to determine that Avalos has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Avalos' conviction and remand for a new trial. This Court should also exercise its discretion and deny appellate costs.

DATED this 27<sup>th</sup> day of January, 2017

Respectfully submitted,

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